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No. 77-1428

In the

Supreme Court of the United States

OCTOBER TERM, 1977

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

vs.

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals For
The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. A copy of the Opinion is attached as Appendix 1 to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did a Three-Judge District Court properly apply the abstention doctrine to preclude it from construing state statutes which are not patently unconstitutional, the provisions of which have never been definitively interpreted by the state courts, and no harmful consequences would arise from the delay necessary to secure an authoritative state court reading of the statutes?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioners' recitation of the statement of the case is substantially correct. Essentially, they seek to hold the Illinois Adoption records system unconstitutional as violative of their rights under the First, Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the Federal Constitution. The state statutory system impounds court files and adoption records, subject to disclosure on petition to an Illinois court. Petitioners did not state that they failed to allege any facts showing that any harmful consequences would ensue if federal abstention was required. In addition, a lawsuit was filed in 1978, in the Circuit Court of Cook County, *In the Matter of Barbara Lois Lebowitz Marks, et al.*, No. 78 Co 307, challenging the Illinois Adop-

tion Records system and raising substantially the same constitutional issues as Petitioners asserted in the federal courts below. (A copy of the petition and Memorandum of Law in Support of Petition for Review of Sealed Adoption Records filed *In the Matter of Barbara Lois Lebowitz Marks, et al.*, are attached as Respondents' Appendixes 1 and 2, respectively.)

ARGUMENT

I.

THE DOCTRINE OF ABSTENTION WAS PROPERLY APPLIED.

In essence, petitioners assert that the federal district court should have reached the merits of their claims even though there is no authoritative Illinois decision interpreting a delicately—balanced statutory scheme or addressing the important constitutional issues raised in the federal court complaint.

Petitioners' argument goes too far. Its very statement reveals that abstention was the only feasible course available below. In the last four decades, this Court has developed a venerable line of cases compelling the conclusions reached by both the Three—Judge District Court panel and the Seventh Circuit Court of Appeals. In view of the correct application of the well—settled rules of law by the courts below, Respondents submit that no issue worthy of *certiorari* is presented herein.

In *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977), the Court explained there are two types of federal abstention:

> The first, usually referred to as *Pullman* abstention involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 493 (1941). See *Bellotti* v. *Baird*, 428 U.S. 132 (1976). The second

> type is *Younger* abstention, in which the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an on—going state proceeding, and as they involved the ability of the state courts to consider federal constitutional claims in that context. *Younger* v. *Harris*, 401 U.S. 37 (1971).

Id., at 477.

The principles of both *Younger* and *Pullman* abstention are applicable in the instant case.

1. Principles of Equity, Comity and Federalism Require Abstention—Younger Abstention.

Considerations of equity, comity and federalism form the heart of the abstention doctrine in either of its facets. These considerations mandate abstention in the instant case, especially because there is a pending state court action seeking resolution of substantially the same issues raised by Petitioners below.[1]

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[1] On March 27, 1978, *In the Matter of Barbara Lois Lebowitz Marks, et al.*, No. 78 Co 307, was filed in the Circuit Court of Cook County. This petition asks for a clarification of the standards needed to unseal Illinois adoption records, as articulated *In the Matter of Daniel Doe*, No. 76 Co 2436 (Cir. Ct. of Ck. Cty., Nov. 22, 1977), an unreported, unappealed Illinois trial court decision. Further, the *Marks* petition challenges the statutory scheme on federal constitutional grounds. (A copy of the *Marks* petition and Memorandum of Law in its support are attached as Respondents' Appendixes 1 and 2.) The same attorney who represents Petitioners herein is also a counsel of record in *Marks*.

Younger v. *Harris*, 401 U.S. 37 (1971) held that a federal court should not enjoin an on-going state criminal proceeding unless extraordinary circumstances where the danger of irreparable loss is "both great and immediate." *Id.*, at 46, quoting, *Fenner* v. *Boykin*, 271 U.S. 240, 243 (1926).

> . . . the notion of "comity," that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. *** the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, supra, at 44.

This principle was extended to restrain federal courts from interfering with certain pending civil proceedings. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). After an adverse judgment in a state civil nuisance action, the defendant elected to forego state appellate review, and sought, instead, federal injunctive and declaratory relief. He alleged the statute was unconstitutional. The Court held abstention warranted, stating:

> A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter

> of right [citing statute]. Thus, appellee in this case was assured of eventual consideration of its claim by this Court. But quite apart from appellee's right to appeal had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which, as we have already explained, is quite costly in terms of the interests which *Younger* seeks to protect.

Id., at 605-606.

In the course of the Court's opinion in *Huffman*, it was noted that:

> [t]he seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief (injunctive and declaratory), they should abide by standards of restraint that go well beyond those of private equity jurisprudence.

Id., at 603. *Massachusetts State Grange* v. *Benton*, 272 U.S. 525 (1926), was cited as illustrative of this concern. That case involved a federal action to enjoin the operation of the Massachusetts daylight savings act—a civil law.

The *Benton* Court affirmed the dismissal of the action by a three-judge District Court panel because:

> . . . . no injunction ought to issue against officers of State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.*** *Fenner* v. *Boykin*, 271 U.S. 240. . . .

Id., at 527-528.

The facts of *Benton* are analogous to the instant case. Both requested a declaration that the challenged state laws were unconstitutional. Both requested an injunction barring state officials from enforcing the law. The only significant difference was that there was no ongoing state proceeding in *Benton,* yet federal court abstention was mandated in that case.

Therefore, the important rule of *Fenner* v. *Boykin, supra,* (barring federal intervention in on-going state criminal proceedings) which laid the conceptual foundation for *Younger, Huffman* and a host of other decisions, was applied in a civil setting almost fifty years ago. It is significant that the same Court which promulgated the *Fenner* rule also handed down the decision in *Benton.*

Abstention is, therefore, appropriate to bar federal declaratory and, particularly, injunctive relief against state officials duty bound to enforce important state civil laws, unless there is a showing great and irreparable injury would arise.

Petitioners in the instant case did not allege below nor in their Petition to this Court that any harm would result if federal court adjudication of their claims was withheld. However, Petitioners' request for declaratory and injunctive relief would substantially interfere with the enforcement of a sensitive, vitally important state statutory scheme. Furthermore, this is not a case, as will be demonstrated, *infra,* where the proper resolution of the important state and constitutional issues is "reasonably free from doubt."

More recently, principles of federalism and comity were applied to a case involving a state's contempt proceedings. In *Juidice* v. *Vail,* 430 U.S. 327 (1977), a judgment debtor, after ignoring subpoenas to appear in supplemental proceedings, was held in contempt of court and imprisoned. The debtor sought federal declaratory relief attacking the constitutionality of the contempt process. The Court held abstention was proper, holding:

> Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceeding. No more is required to invoke *Younger* abstention. [Emphasis in original, footnote omitted.]

Id., at 337.

Trainor v. *Hernandez,* 431 U.S. 434 (1977), held a district court was restrained from granting declaratory and injunctive relief in an action challenging the constitutionality of the Illinois Attachment Act. A Writ of Attachment had been issued against the parties and proceedings had been commenced in the Illinois Circuit Court. This Court declared:

> For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts.

Id., at 445.

In the instant case, the important principles of equity, comity, and federalism will be fostered by abstention.

The opportunity to litigate the constitutional claims of importance to both Petitioners and Respondents herein are certain of state court attention and resolution. The pending state court lawsuit raises substantially the same federal constitutional issues as Petitioners raised below.

Abstention will insure that duplicative federal and state court decisions will not arise and, thus, needless antagonism in state and federal relations will be avoided.

More importantly, state and local officials will not be precipitously enjoined from administering the Illinois adoption records system, which is of vital importance to the state. There is no risk of immediate, irreparable harm to the Petitioners if federal review is withheld pending a determinative state court interpretation of the challenged statutory scheme.

Finally, abstention here will serve the salutory goal of granting the state courts the first opportunity to construe the contested statutes. The Illinois appellate process may be employed to narrow and to clearly define the constitutional issues. If they survive and are determined adversely to the Petitioners' interests, then, but only then, will federal court review by warranted.

2. Necessity for State Court Interpretation of Undefined Statutory Terms—Pullman Abstention.

Railroad Commission of Texas v. *Pullman Co.*, 312 U.S. 496 (1941), established an equitable principle requiring a federal district court to withhold constitutional scrutiny of a state statute, fairly open to interpretation, until the state courts have made a definitive analysis of the enactment.

> Where resolution of the federal constitutional question is dependent upon, or may be materially altered by,

> the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.

Harman v. *Forssenius,* 380 U.S. 528, 534 (1965). However, these goals must be considered in light of "the delay and expense to which application of the abstention doctrine inevitably gives rise. *Lake Carriers' Assn.* v *MacMullen,* 406 U.S. 498, 509 (1972), quoting, *England* v. *Medical Examiners,* 375 U.S. 411, 418 (1964).

a. Constitutional Reconciliation

Petitioners contended below that the Illinois statutory scheme, outlined in Illinois Revised Statutes ch. 4, § 9.1-18 and ch. 111-½, §13-17 (1975), unconstitutionally deprives them of an unfettered right of access to their birth and adoption records. More specifically, these statutes provide that adoption records may be impounded by court order and unsealed only upon specific court order. A General Order, effective only in Cook County (one of 102 Counties in Illinois), has impounded all adoption records since 1974. (Petitioners' Appendix 55, at E3.)

A federal court cannot abstain from decision if the statute is so patently unconstitutional that no interpretation by a state court could bring it in harmony with the Constitution. *Zwickler* v. *Koota,* 389 U.S. 241, 251-252 (1967). Therefore, abstention is proper if the district court finds the statute can be constitutionally construed or construed to avoid or materially alter the federal constitutional question. *Bellotti* v. *Baird,* 428 U.S. 132, 147 (1976), *Carey* v. *Sugar,* 425 U.S. 73, 78-79 (1976), *Kusper* v. *Pon-*

tikes, 414 U.S. 51, 54-55 (1973), *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959).

The Three-Judge District Court panel in this case, after consideration of all arguments, concluded:

> The defendants and Intervenor suggest that the statutes can be construed so as to allow the Illinois courts to balance the interests of all parties. We agree with this approach and conclude that the State courts can thus apply the statutes in such a way as to withstand constitutional attack.

(Petitioners' Appendix 55, at E7-E8.)

Furthermore, Petitioners' constitutional claims raise questions of first impression. Without the benefit of a single decision directly on point, they proclaim the existence of a fundamental right to know and to obtain information about one's natural parentage. They argue that "adoptees" make up a "suspect" classification, requiring strict scrutiny of the challenged Illinois provisions. The Three-Judge District Court panel below observed there is no firm precedent to support any of these claims (Petitioners' Appendix 5, at E8-E9).

Therefore, it would be difficult, if not impossible, for a court to hold the Illinois statutory scheme patently impinges on any cognizable, constitutionally protected rights. (No further consideration of the constitutional claims is warranted in these proceedings.)

If it can be fairly concluded that the statute can be constitutionally construed, as it was in the instant case, then the threshold requirement for abstention is met. *See, Bellotti* v. *Baird, supra,* at 148, *Kusper* v. *Pontikes, supra,* at 55. The doctrine does not forbid a court to engage in a lengthy constitutional reconciliation of the

statute, but it does not mandate it. All that is needed is a finding that constitutionally reasonable interpretation is possible. Peititoners' assertion that no attempts to determine the constitutionality of the Illinois statutes is meritless.

This case does not involve a statute treading on clearly recognized fundamental federal rights, such as the right to vote, *Harman* v. *Forssenius, supra,* or First Amendment Freedoms, *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), *Zwickler* v. *Koota, supra,* where no state court interpretation could save the enactment from constitutional violation.

However, this case *does* involve important but, as yet clearly undefined, questions of state law, which should be decided in the first instance by the state courts.

b. Unsettled Questions Of State Law.

Abstention is mandated to permit the Illinois statutory scheme to

> . . . be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court.

Harrison v. *N.A.A.C.P., supra,* at 178.

When this action was originally filed, petitioners conceded no interpretation of the contested statutory scheme had been made by any court—state or federal. In the midst of appellate review of the procedural issues in this case, an Illinois trial court handed down an unreported decision, *In the Matter of Daniel Doe* (Petitioners' Appendix 2) limited, however, to state law questions.

The federal constitutional claims pressed by Petitioners below in federal court were not raised in the state action, although the same attorney represented plaintiffs in both the federal and state proceedings. The final decision in *Doe* was never appealed, thus efficiently barring any authoritative, definitive state review of even the complex state law questions.

As summarized by the Seventh Circuit Court of Appeals, the state court, interpreting the Illinois laws, established a standard for opening adoption records. If an adoptee can

> .... show by a preponderance of the evidence that, as an adult, he or she has a *real and immediate* need for such records, and if such a showing is made, the biological and adoptive parents in order to avoid unsealing must show by a preponderance of the evidence that *substantial harm* will transpire if the relief requested is granted. [Emphasis added.]

(Petitioners' Appendix 1, at A7.)

The Seventh Circuit analyzed the *Doe* standards explaining that while a "good cause" element was read into the statutes and General Order, this failed to remove the inherent ambiguities. "Good cause" was viewed as a substitute for several other broad terms which were undefined. Two key phrases in the *Doe* standard, "real and immediate need" and "substantial harm," were not clearly defined. The Court of Appeals also noted that defendants (Respondents herein) suggested at oral argument that adulthood alone could constitute good cause and that an order or statutory provision could so provide. (Petitioners' Appendix 1, at A7 n. 8.) This example was obviously given to point up the range of potential interpretations an Illinois court might well read into the *Doe* decision and its underlying enactments.[2]

It is also important that the General Order reviewed in *Doe* is only the order of one court of one county in Illinois construing the limits of the challenged Illinois statutes. An interpretation of that Order, therefore, does not require the conclusion that it is the final word on the construction of the statutes or that it reflects the policy of the state of Illinois.

Where state law questions are uncertain and clearly capable of a limiting interpretation, federal court abstention has been ordered by this Court. *See, Bellotti* v. *Baird, supra,* at 146-147, *Carey* v. *Sugar, supra* at 77-78, *Zwickler* v. *Koota, supra,* at 251, n. 14, *Harman* v. *Forssenius, supra,* at 534 and *Harrison* v. *N.A.A.C.P., supra,* at 534.

Abstention is especially appropriate where "good cause" or "just cause" standards are at issues as in the instant case, because they are open to a variety of interpretations. *Bellotti* v. *Baird, supra,* at 146, *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 44 (1970).

Here the statutes and General Order are open to and, in fact, demand further interpretation.

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[2] The ambiguous standards set forth in *Doe* have already generated some confusion. In the Memorandum of Law supporting the complaint *In the Matter of Barbara Lois Lebowitz Marks, et al.* (Respondents' Appendix 2), the plaintiffs stated that the standards for releasing adoption records remained unclear. They seek a clarification of the terms "real and immediate need" and "substantial harm." (Respondents' Appendix 2, at 3-4). The *Marks* action underscores the dire need for a definitive state court interpretation of the Illinois statutes. It eloquently affirms the correctness of federal court abstention.

> The paradigm case for abstention arises when the challenged state statute is susceptible of 'a construction by the state courts that would avoid or modify the [Federal] constitutional question. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152. Compare *Baggett* v. *Bullitt*, 377 U.S. 360, [12 L.Ed.2d 377, 89 S.Ct. 1316.]' *Zwickler* v. *Koota, supra,* at 249 . .

Lake Carriers' Assn. v. *MacMullen, supra,* at 510-511. The instant case falls effortlessly into this class of cases warranting abstention. Any federal court decision now could be displaced and, thus, unnecessary if an Illinois reviewing court issued a conclusive decision on the challenged statutory scheme. This result would be at odds with the abstention doctrine. *Railroad Commission* v. *Pullman, supra.*

Furthermore, without a thorough, comprehensive analysis by a state reviewing court defining the "good cause" requirements of *Doe* there is no way to pinpoint the precise federal question presented by the instant case, as the Court of Appeals correctly stated. (Petitioners' Appendix 1, at A9.) Yet, the federal constitutional question must be clearly defined to make federal adjudication proper. Otherwise, a federal court would improperly pass on "constitutional contentions presented in an abstract rather than a concrete form." *Government & Civic Emp. Org. Comm.* v. *Windsor*, 353 U.S. 364, 366 (1957).

For more than two hundred years, federal courts have refused to render advisory opinions on a set of hypothetical facts. It is a principle so well recognized it needs no authority. But, this is exactly what Petitioners have requested in the instant case.

As additional, compelling support for abstention, the Seventh Circuit reasoned that even if *Doe* resolved all the ambiguities in the statutory scheme, still it is not a final, authoritative interpretation—this must come from a higher reviewing court. It quoted *Connecticut State Federation of Teachers* v. *Board of Education,* 538 F.2d 471, 485 (2d Cir. 1976) for the conclusion that:

> decisions by state trial judges, particularly unreported decisions, generally provide insufficient clarity to make abstention inappropriate at least in the absence of a similar decision by the state's appellate courts. [footnote omitted].

(Petitioners' Appendix 1, at A9.)

In *Government & Civic Employees Union* v. *Windsor, supra,* this Court sanctioned abstention in a factual setting analogous to the instant case. In a federal court action, a union challenged the constitutionality of an Alabama law limiting benefits to public employees who joined unions. The federal court abstained to permit the union to obtain an authoritative state court interpretation. However, state review was limited to the coverage of the act and no constitutional issues were raised. After Alabama trial and Supreme Court decisions holding the act applied to the union, the union returned to federal court. Abstention was invoked again, because the state failed to construe the law unconstitutionally and there was no indication it would do so in a later review.

This Court affirmed the District Court decision because

> . . . bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute

> in light of the constitutional objections presented to the District Court. If appellants' freedom-of-expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner.

Id., at 366.

Similarly, the *Doe* decision, while not even appealed to an intermediate Illinois court, never decided the constitutional issues raised by Petitioner in the federal proceeding. (*See,* Petitioners' Appendix 2, at B12-B20.) *Windsor* instructs that to foreclose abstention, a state court interpretation is required of all the unsettled issues—both local and federal—not merely those a complaining party may wish to litigate.

Petitioners have asserted constitutional rights which have never been judicially recognized. They would have a federal court not only grapple with complex state law questions and policies, best left to the state, but define and recognize new, fundamental constitutional rights. The decision would be a landmark. But a federal court is not the forum in which such important and intertwined questions of federal and state law should be first reviewed. Only a well-briefed and argued case, subject to thoughtful analysis at the various levels of a state's reviewing courts will produce a decision with narrowly, well-defined constitutional questions, should they even exist in the instant case. Illinois courts have a duty to protect the Petitioners' federal constitutional rights and are presumed capable of interpreting the statutes to that end. This is the kind of authoritative, definitive state court interpretation that will grant a federal court authority to reach the constitutional issues in a state statute.

The *Doe* decision does not and never could supply the necessary state court interpretation to block abstention in the instant case.

c. Important State Policies Requiring Abstention.

The federal court below properly abstained to avoid premature constitutional decision of a state statutory scheme touching on one of the most sensitive areas of state concern—the family. It is an area governed almost exclusively by the state. As advised in *Railroad Commission* v. *Pullman, supra,* at 498, abstention is imperative when a complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." As is clear, there are other alternatives to federal decision in the instant case.

In the recent decision of *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 824 (1976), this Court held abstention proper "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar." The Seventh Circuit found this citation characterized the issues in the instant case. (Petitioners' Appendix 1, at A10.)

The Illinois statutory scheme attempts to balance the complex, emotion-ridden relations among children, their natural and adoptive parents. Federal courts have only reluctantly entered controversies concerning family law and probate, *Ex Parte Burrus,* 136 U.S. 586 (1890), imimplicitly recognizing the need for local resolution of these matters.

It is obvious that the difficult and vitally important questions of state law surrounding the Illinois adoption

records system transcend the case at bar. A federal court has been asked to decide issues that will not only affect these seven Petitioners, but could dramatically alter the lives of thousands of men, women and children in the state of Illinois, perhaps even across the nation. The virtual certainty of such an awesome result should shift the balance in favor of a thorough state court determination. Thus, federal abstention was and remains the only course.

d. No Harm Would Arise from the Delay Caused by Abstention.

In *Lake Carrier's Assn.* v. *MacMullen, supra,* at 509, this Court cautioned that a decision to abstain should include consideration of "the delay and expense to which application of the abstention doctrine inevitably gives rise." *Accord, Bellotti* v. *Baird, supra,* at 150; *Harman* v. *Forssenius, supra,* at 537.

The Seventh Circuit, in its opinion affirming abstention, held that no "substantial personal consequences" would arise to Petitioners from a delay of federal review, (Petitioners' Appendix 1, at A10.) It also noted that Petitioners had failed to argue any harm would arise from delay. (Petitioners' Appendix 1, at A10, n. 13.) In their Petition to this Court, they again failed to allege any harm would result from a state court review.

The constitutional and state questions are now before an Illinois trial court, *In the Matter of Barbara Lois Lebowitz Marks*, No. 78 Co 307, (Cir. Ct. of Ck. Cty.) (Respondents' Appendix 1) The Illinois appellate process is available to review the contested statutory scheme and to produce a definitive interpretation of the state and constitutional questions.

Therefore, the absence of any showing of a need for an expeditious federal court hearing, coupled with the availability of a state forum for the presentation of the constitutional claims, abstention was proper.

CONCLUSION

The federal district court properly abstained from consideration of the unclear state and uncertain constitutional issues presented in the instant case. Thus, the important principles of equity, comity, and federalism, at the heart of the abstention doctrine, were fostered. This decision was correctly affirmed by the Court of Appeals for the Seventh Circuit.

Wherefore, Respondents pray that the Petition for Certiorari should be denied.

Respectfully submitted,

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Of Counsel.

APPENDIX 1

PETITION FOR REVIEW OF SEALED PERSONAL BIRTH RECORDS

1. The Petitioners, adult adoptees who were adopted through the Circuit Court of Cook County, Illinois are presently adults, who for a variety of reasons wish to obtain their court and birth records so that they may attempt to discover their birth parents.

2. Barbara Lois Lebowitz Marks was born on August 6, 1944 and believes that the decree for her adoption was entered on August 17, 1944 in Chicago, Illinois.

3. Her adoptive parents were Morris and Mary Lebowitz of Minneapolis, Minnesota. Her adoptive father died in 1963. Her adoptive mother's name is Mary Lebowitz Levy and she currently lives in Minneapolis, Minnesota and has no objections to her adopted daughter's efforts to gain access to her birth records. (See attached Affidavit)

4. Petitioner Marks is the mother of a child—presently eight years old who is mentally retarded and epileptic—and therefore believes that it is essential to learn as much as possible about her genetic history.

5. Doris A. Haag was born on March 1, 1930 and adopted on or about June 1930 through the Beulah Home and Maternity Hospital. She has maintained a desire to obtain her birth records to attempt to learn of her identity and her parents names and identity.

6. Roger Barth was born on July 14, 1949 and adopted by private adoption during 1950.

7. Bonnie Olson was born on October 29, 1939 and adopted on or about February 2, 1940 through the Cradle Adoption Agency.

PRAYER

The Petitioners respectfully ask that this Court order that their court and birth records be immediately open to each of them so that they may begin to attempt to determine who their natural birth parents are.

Respectfully submitted,
/s/ Patrick T. Murphy
Patrick T. Murphy
Sharon Covelman

GOLDBERG & MURPHY, LTD,
33 N. LaSalle—Suite 2300
Chicago, Illinois 60602
(312) 782-4530

Sharon Covelman
Legal Assistance Foundation
911 South Kedzie
Chicago, Illinois
638-2343

STATE OF MINNESOTA)
) ss AFFIDAVIT
COUNTY OF HENNEPIN)

BARBARA LEBOWITZ MARKS, being first duly sworn on oath, deposes and says:

1. That her true and correct name and address are as follows:

Barbara Lois Lebowitz Marks
5704 Winnetka Avenue North
New Hope, Minnesota 55428

Further, that to the best of her knowledge, she was born on August 6, 1944, in Chicago, Illinois.

2. That she has no information as to the exact place or circumstances of her birth.

3. That a decree of adoption was entered on August 17, 1944, in Chicago, Illinois; that the attorneys involved in the adoption are believed to have been Samuel Finkelstein, of Minneapolis, Minnesota, and the late B. Hamilton Edison, of Chicago, Illinois.

4. That affiant's adoptive parents were Morris and Mary Lebowitz, of Minneapolis, Minnesota; that her adoptive father, Morris Lebowitz, died in 1963; that her adoptive mother, whose name is now Mary Lebowitz Levy, currently lives in Minneapolis, Minnesota, and has no objection to her adopted daughter's effort to gain access to her birth records.

5. That affiant wishes to obtain access to information about her natural parents primarily for medical reasons; that affiant has one child, an 8 year old boy, who is both mentally retarded and epileptic; therefore, affiant

feels it is essential for her to learn as much as possible about her genetic history.

6. Further, that affiant has sought personal counseling at the Bach Institute in Minneapolis, Minnesota; that Dr. Jerome Bach, M.D., a psychiatrist and the director of the institute, recommended that she attempt to seek out her birth records for reasons pertaining to her mental health.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Barbara Lois Lebowitz Marks
Barbara Lois Lebowitz Marks

Subscribed and sworn to before me
this 4th day of February, 1978.
/s/ Maureen P. Burns
Notary Public
STAMP
Maureen P. Burns
Notary Public-Minnesota
Hennepin County
My Commission Expires Oct. 19, 1984

APPENDIX 2

NOTICE OF FILING

To: John Dienner, III, Esq.
Asst. State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602

Patrick Murphy, Esq.
Goldberg & Murphy, Ltd.
Suite 2300
33 North LaSalle Street
Chicago, Illinois 60602

Please Take Notice that on May —, 1978 I shall file with the Clerk of the Circuit Court of Cook County, Illinois the attached Memorandum in Support of Petition for Review of Sealed Records above entitled cause.

SHARON COVELMAN

Sharon Covelman
Lawndale Legal Services
Legal Foundation of Chicago
911 South Kedzie Ave
638-2343
Chicago, Illinois 60612
6 38-2343

CERTIFICATE OF SERVICE

Sharon Covelman affirms that on May , 1978 she served upon the above named individuals a copy of the foregoing Memorandum in Support of Petitioners' Position in the above entitled cause by depositing said copy in the United States Mail at 900 S. Kedzie, Chicago, Illinois.

SHARON COVELMAN

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REVIEW OF SEALED ADOPTION RECORDS

Petitioner Barbara Lois Lebowitz Marks is a thirty-three year old woman who was adopted in her infancy by Mr. and Mrs. Morris Lebowitz of Minneapolis, Minnesota. Morris Lebowitz, petitioner's adoptive father, died in 1963. Her adoptive mother, Mary Lebowitz Levy, has informed petitioner that she was born on or about August 6, 1944 and that a decree of adoption terminating the parental rights of petitioner's natural parents and adjudging Morris and Mary Lebowitz her adoptive parents was entered on August 17, 1944, in Chicago, Illinois.

Aside from her knowledge of the date and place of the adoption decree's entry, Barbara Marks has no information as to the circumstances surrounding her birth and adoption. (See Affidavit of Barbara Lois Lebowitz Marks attached hereto as Exhibit A). She does not know the identity of her natural parents, their medical histories, or the medical histories of any of their other children. Nor does she have any knowledge of her own medical condition at birth.

Eight years ago, petitioner Marks gave birth to a son. The child has suffered since birth from a brain disfunction and from epilepsy (see Affidavit of Barbara Marks). Petitioner has been informed by doctors who have examined the boy that they are unable at this time to determine the cause of his retardation. The doctors have also told petitioner that there is a distinct possibility that the cause of her son's retardation may be a genetic defect but that this cannot be determined for certain until more is known about her own genetic history. Petitioner seeks access to her adoption records partially because they

may enable her to obtain medical treatment for her son which could result in the improvement of his health and mental development.

A second pressing concern that underlies petitioner's quest for access to her birth records is a fundamental uncertainty about whether she ought to consider giving birth to other children. Petitioner is convinced that she cannot reach an intelligent decision as to whether she ought to bring more children into the world until she knows whether she is a carrier of a genetic defect which would make it likely that they too, would be physically or mentally handicapped.

Finally, petitioner seeks access to these sealed records in an effort to further her own emotional development. For some years now she has been under the care of Dr. Jerome Bach, a licensed psychiatrist practicing at the Bach Institute in Minneapolis, Minnesota. Dr. Bach has diagnosed petitioner as suffering from severe feelings of abandonment. He has noted in petitioner a tendency to retreat into fantansies centered around the mystery of her origin when the strains of daily living weigh heavily upon her. Dr. Bach feels that it would help petitioner greatly in her efforts to overcome this tendency and develop into a responsible adult and parent if she were to learn the history of her earliest childhood and the circumstances surrounding her adoption. (See opinion letter of Jerome Bach, M.D. attached hereto as Exhibit B).

Petitioner in her affidavit, which states that she seeks access to her records "primarily for medical reasons" and Dr. Bach in his opinion letter reject the proposition that her desire to learn more about her family history is predicated on mere idle curiosity.

ARGUMENT

Petitioner's claim to a right to inspect her birth records is premised upon the Illinois statutes mandating the confidentially of such records. Ill. Rev. Stat., Ch. 4, §9.1-8 and Ill. Rev. Stat., Ch. 111½, §73-17(2)(a), and upon the First, Ninth and Fourteenth Amendments to the United States Constitution.

Ill. Rev. Stat. Ch. 4 9.1-8 provides, in part, that:

> "Upon motion of any party to an adoption proceeding the court shall, or upon the court's own motion the court may order that the file relating to such proceeding shall be impounded by the clerk of the court and shall be opened for examination only upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file. Certified copies of all papers and documents contained in any file so impounded shall be made only on like order ...."

A companion statute, Ill. Rev. Stat., Ch. 111 1/2 &73-17 (2)(a) 1975 provides that after the decree of adoption is entered:

> "the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certificate except upon order of a court of competent jurisdiction or as provided by regulation . . ."

Finally, Ill. Rev. Stat., Ch. 111 1/2 §73-17(4) directs that:

> "when a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any

> custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection . . ."

Taken together, these three statutes serve as the basis for the present policy and practice of Illinois Courts. At present, all adoption records in Illinois are impounded by the clerk of the court, on the court's own motion, immediately after the decree of adoption has been entered. Adoptees seeking access to these records have no choice but to petition courts in proceedings like this one for permission to view these records.

It is important to note that Ill. Rev. Stat., Ch. 4 § 9.1-8 and Ch. 111 1/2 §73-17(2)(a) provide no standard which might guide a judge in determining whether adoption records ought to be opened for the adoptee's inspection. In Illinois, this decision has been left to the unfettered discretion of the judge. Only one unreported opinion of the Circuit Court of Cook County, *In the matter of Daniel Doe,* 76 C 2436, handed down on November 22, 1977, has confronted the question of whether an adoptee is entitled to view his own adoption records.

In the *Daniel Doe* case, Doe's petition contained allegations that he had been under psychiatric care for eleven years and that his psychiatrist believed that release of information about his origins would alleviate much of the emotional anxiety that he had suffered from the past. The allegations of the petition in *Daniel Doe* were supplemented by an evidentiary hearing during which the petitioner introduced evidence that he had attempted suicide on several occasions. The opinion of the court makes no mention of any countervailing claims to secrecy raised by his natural or adoptive parents.

On the strength of this record, the court in *Daniel Doe* found that Doe had "established a prima facie case for the release of these records by showing by a preponderance of the evidence that he, as an adult, has a 'real and immediate need' for such records." The opinion contained extensive discussion of recent legal challenges to the constitutionality of sealed records statutes, the current trend of opinion among professional psychologists that disclosure of birth records to adoptees is necessary in many instances to insure their development into healthy adults, and the necessity of weighing the competing legal interests of adopted children against the legal interests of their parents in determining the constitutionality of sealed records statutes. The opinion also referred to the possibility that the present Illinois statutes were constitutionally flawed because a) they discriminated against adoptees who might be considered a "suspect class" of people in a position akin to those whose race, lineage, or alienage caused them to be treated more harshly than others under the law; b) they prevented adoptees from receiving vital information, a right protected by the First Amendment; c) they failed to give adequate guidelines as to standards for release of information and persons who required notice before the information could be released and were therefore void for vagueness.

However, after this plenitude of discussion the court in *Daniel Doc* failed to make a finding that the right of an adopted person to knowledge of his or her identity is a fundamental constitutional right protected by the First and/or Ninth Amendments, although such a finding is implied by the court's decision to release the records and its concern about establishing an orderly procedure

for the release of the information sought by the petitioner. In addition, the court failed to clarify the meaning of the "real and immediate need for the release of records" and to set forth the guidelines for what is needed to make a showing of "real and immediate need' for adoption information. The present state of the case law leaves unclear the question of whether it is necessary for petitioner-adoptees to allege a history of severe medical problems complete with a documentary history of treatment by a physician and a physician's opinion that knowledge of family history is essential to the recovery of the patient's health.

Finally, the opinion contains findings that both the natural and the adoptive parents have an interest in the release of the desired information to adoptees and requires that notice be given to both sets of parents before such information is released. Immediately following this pronouncement on the necessity of giving notice and the opportunity to be heard the court concludes that "absent a showing that the adoptive or biological parents will suffer substantial harm, the records shall be released. The burden will be shifted from the petitioner to the adoptive and biological parents to show by a preponderance of the evidence that the harm they will suffer will outweigh any benefit the petitioner might receive." The language of the opinion makes it impossible to ascertain whether absence of "substantial harm to the adoptive or biological parents" is the only showing which must be made to gain access to adoption information or whether the standard is "absence of substantial harm" *and* "real and immediate need" for the records.

It is suggested that the ambiguities in the *Daniel Doe* opinion discussed above must be clarified through the

case law if Illinois law is to meet current constitutional requirements. Lack of clarification will not only subject Illinois statutes to constitutional attack in federal and state courts but also will continue to subject adoptees and their biological and adoptive parents to much burdensome expense and anxiety while these questions are litigated.

Petitioner Barbara Marks urges this court to make an explicit finding that possession of information about one's family heritage and biological and cultural history is a fundamental constitutional right which may not be denied to an adult person. Petitioner's position is supported by a long line of cases upholding the First Amendment right to receive information and ideas. See *Martin* v. *City of Struthers* 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General* 381 U.S. 301, 307-308 (1965); and *Stanley* v. *Georgia* 394 U.S. 557 (1968). Petitioner is aware that *Martin, Lamont,* and *Stanley* all rest upon the theory that the First Avendment guarantees a right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. Additionally, petitioner is aware that neither she nor other adoptees can claim to be isolated in their privacy. She admits that the natural and adoptive parents of adoptees have rights to privacy which the state is justified in attempting to protect, to a limited extent. However, she maintains that the interests of the natural and biological parents in secrecy are outweighed in her case by her own interest in the opportunity to develop her personality to a point where she herself may be able to act as a responsible parent and healthy member of the community. In denying petitioner this opportunity, the court would be denying her many of "unenumerated rights" found

to inhere in the penumbra of the First Amendment and discussed by the Supreme Court in *Griswold* v. *Connecticut* 381 U.S. 479, 482 (1965):

> "By *Pierce* v. *Society of Sisters* . . . the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer* v. *Nebraska* . . . the same dignity is given the right to study the German language in private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read [citation omitted] and freedom of inquiry, freedom of thought, and freedom of teach [citation omitted]—indeed the freedom of the entire university community [citations omitted]. Without these peripheral rights the specific rights would be less secure.

If petitioner's claim that a knowledge of her identity is a fundamental right protected by the First and Ninth Amendments is accepted, the Illinois sealed records statutes must be found to represent a compelling state interest and be narrowly drawn in order to be found constitutional. See *Roe* v. *Wade,* 410 U.S. 113, 155 (1973) and *Sherbert* v. *Verner* 374 U.S. 398, 406 (1963). Petitioner contends that while these statutes may represent the Illinois legislature's concern with the preservation of the family unit, "perhaps the most fundamental social institution of our society" cf. *Trimble* v. *Gordon,* 430 U.S. 762 (1977) any interpretation which does not permit opening of the records to an adult adoptee on a showing

of "real and immediate need" not necessarily to include proof of a history of physical or mental illness is not narrowly drawn enough to satisfy constitutional requirements.

Petitioner's position is bolstered by *Thorpe* v. *Thorpe* 48 Ill. App. 2d 455, 198 N.E. 2d 743 (1962), *Stolder* v. *Stone* 412 Ill. 488, 107 N.E. 2d 696; and *Petition of Perl* 38 Ill. App. 2d 430, 187 N.E. 2d 303 all of which interpret Section 15 of the Illinois Adoptive Act. Ill. Rev. Stat., Ch. 4, §9.1-15 as providing that "the question of paramount importance in any adoption proceeding is what will be in the best interest of the child." *Thorpe* v. *Thorpe, supra* at 462. Petitioner contends that while the interests of the child during minority may be best served by withholding from the child the identity of his parents, thus allowing the child to develop love and affection for the adoptive parents without competition from other sources, once this development has taken place and the child is able to grapple with the notion that he may have another set of relatives who may possess information about him that he deems valuable, his best interests are served by the expeditious release of the desired records.

CONCLUSION

What is needed in Illinois is not only a clearer articulation of the standards which an adoptee must meet in order to gain access to his or her records but also a method of insuring that such access can be obtained easily and without resort to lengthy and burdensome litigation

Petitioner proposes that Illinois adopt some features of the method proposed by the New Jersey Superior Court in *Lovallo* v. *New Jersey State Registrar* C-3349-75 (1977).

In that opinion the court held that "where a natural parent has consented [to disclosure of the records] disclosure should be automatic. Additionally, that court held that "if the adoption agency or the biological parent refuses to consent to the divulgence of identifying data, the adoptee shall have the right to appeal to the court." Finally, where the investigation of an adoption agency fails to locate the natural parents, the *Lovallo* decision allows the adoptee " to appeal to the court for the information necessary to carry on the search."

With the establishment of criteria for the release of adoption information and a workable procedure for releasing the information, Illinois will have moved into the vanguard of states who have abandoned the principle of confidentiality for confidentiality's sake and moved closer to recognizing the rights of its adopted citizens.

/ s/ Sharon L. Covelman

Sharon Covelman
Legal Assistance Foundation of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

STATE OF MINNESOTA)
) ss AFFIDAVIT
COUNTY OF HENNEPIN)

BARBARA LEBOWITZ MARKS, being first duly sworn on oath, deposes and says:

1. That her true and correct name and address are as follows:

Barbara Lois Lebowitz Marks
5704 Winnetka Avenue North
New Hope, Minnesota 55428

Further, that to the best of her knowledge, she was born on August 6, 1944, in Chicago, Illinois.

2 That she has no information as to the exact place or circumstances of her birth.

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6. Further, that affiant has sought personal counseling at the Bach Institute in Minneapolis, Minnesota; that Dr. Jerome Bach, M D., a psychiatrist and the director of the institute, recommended that she attempt to seek out her birth records for reasons pertaining to her mental health.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Barbara Lois Lebowitz Marks
Barbara Lois Lebowitz Marks

Subscribed and sworn to before me
this 9th day of February, 1978.
/s/ Maureen P. Burns
Notary Public

STAMP
(Letterhead)

THE BACH INSTITUTE

Human Systems
Family Community Business

May 10, 1978

To Whom It May Concern:

RE: Barbara Marks

We have been working with Barbara Marks in her emotional growth and development for approximately 2 years. We believe that it is essential for her at some point in her course in therapy to know the origins of her birth and to know something about the nature of the family from which she came, be it individual or couple,

including past generations. It is not a frivilous or an idly curious experience that we are asking her to have. We are insistent that she has a continuity within herself that allows her to be an effective, functioning mother and appropriately healthy woman in order to be an effective person for her child. She will need to know more about her childhood and origins than she has been so far able to determine. She needs, at some point, to uncover all the secrets in her life so they can put to rest and not continue to be the source of fantasy, idealized romance, or place to retreat when her current realities become overwhelming. It is our therapeutic belief that at some point it will be important for her to know about those natural origins. We strongly support her petition to have those records examined in a therapeutic setting.

Our experience is in the area of family theory and family practice. I am a Family and Child Psychiatrist, Associate Clinical Professor, University of Minnesota Medical School, Department of Psychiatry, where I teach medical students, post graduate fellows in psychiatry and child psychiatry. I'm also Adjunct Professor of Law and Medicine, University of Minnesota Law School, where I teach courses in Family Law. I also work as an ongoing consultant with adoption and foster placement agenceis, including national agencies, such as Children's Home Society, and have been very involved for the past 15 years in the areas of adoptions and placements, being aware of both the legal, emotional, psychological aspects of discovering one's parenthood.

I hope her petition is granted and that therapeutically, the information shared will be used to, when it is fitting, for the progress she is making and not as a premature experience in just collecting old information.

Sincerely yours,

/s/ Jerome M. Bach, M.D.
Jerome M. Bach, M.D.
Medical Director

JMB/gh 628 Nicollet Mall, Room 60, Minneapolis, Minnesota 55402. Telephones (612) 339-1777 or 588-1101